

Mental Competency Evaluations: Guidelines for Judges and Attorneys

Patricia A. Zapf and Ronald Roesch

Competency to stand trial is a concept of jurisprudence allowing the postponement of criminal proceedings for those defendants who are considered unable to participate in their defense on account of mental or physical disorder. It has been estimated that between 25,000 and 39,000 competency evaluations are conducted in the United States annually.¹ That is, between 2% and 8% of all felony defendants are referred for competency evaluations.²

In this article, we will present an overview of competency laws, research, methods of assessment, and the content of reports to the courts conducted by clinicians, with the aim of providing a summary of relevant information about competency issues. The purpose of this article is to inform key participants in the legal system (prosecutors and defense attorneys, as well as judges) about the current state of the discipline of forensic psychology with respect to evaluations of competency.³

BACKGROUND & DEFINITION

Provisions allowing for a delay of trial because a defendant was incompetent to proceed have long been a part of legal due process. English common law allowed for the arraignment, trial, judgment, or execution of an alleged capital offender to be stayed if he or she “be(came) absolutely mad.”⁴ Over time, statutes have been created that have further defined and extended the common-law practice.

The modern standard in U.S. law was established in *Dusky v. United States*.⁵ Although the exact wording varies, all states use a variant of the *Dusky* standard to define competency.⁶ In *Dusky*, the United States Supreme Court ruled that a minimum level of rational understanding of the proceedings and ability to help one’s attorney was required:

[I]t is not enough for the district judge to find that “the defendant [is] oriented to time and place and [has] some recollection of events,” but that the “test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.”⁷

Although the concept of competency to stand trial has been long established in law, its definition, as exemplified by the ambiguities of *Dusky*, has never been explicit. What is meant by “sufficient present ability”? How does one determine whether a defendant “has a rational as well as factual understanding”? To be sure, some courts⁸ and legislatures⁹ have provided general direction to evaluators in the form of articulated *Dusky* standards,¹⁰ but the typical forensic evaluation is left largely unguided except by a common principle, in most published cases, that evaluators cannot reach a finding of incompetency independent of the facts of the case at hand.

This article was adapted from Ronald Roesch, Patricia A. Zapf, Stephen L. Golding & Jennifer L. Skeem, *Defining and Assessing Competency to Stand Trial*, in *HANDBOOK OF FORENSIC PSYCHOLOGY* 327 (Irving B. Weiner & Allen K. Hess, eds., 2d ed. 1999)

Footnotes

1. Steven K. Hoge, et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 *LAW & HUM. BEHAV.* 141 (1997); Henry J. Steadman & E. Hartstone, *Defendants Incompetent to Stand Trial*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 39 (John Monahan & Henry J. Steadman eds., 1983).
2. Richard J. Bonnie, *The Competence of Criminal Defendants: A Theoretical Reformulation*, 10 *BEHAV. SCI. & L.* 291 (1992); STEPHEN L. GOLDING, *INTERDISCIPLINARY FITNESS INTERVIEW-REVISED: A TRAINING MANUAL* (1992); Steven K. Hoge, et al., *Attorney-client Decision-making in Criminal Cases: Client Competence and Participation as Perceived by Their Attorneys*, 10 *BEHAV. SCI. & L.* 385 (1992).
3. This article focuses on competency issues within the United States. For a review of competency issues with respect to Canadian laws and practice, the reader is referred to Patricia A. Zapf & Ronald Roesch, *Assessing Fitness to Stand Trial: A Comparison of Institution-based Evaluations and a Brief Screening Interview*, 16 *CAN. J. COMMUNITY MENTAL HEALTH* 53 (1997); and Patricia A. Zapf & Ronald Roesch, *A Comparison of Canadian and*

American Standards for Competence to Stand Trial, *INTL. J. L. & PSYCH.* (in press).

4. Hale, 1973, cited in P. R. Silten & R. Tullis, *Mental Competency in Criminal Proceedings*, 28 *HASTINGS L.J.* 1053, 1053 (1977).
5. 362 U.S. 402 (1960).
6. R. J. Favole, *Mental Disability in the American Criminal Process: A Four Issue Survey*, in *MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE* 247 (John Monahan & Henry J. Steadman eds., 1983).
7. 362 U.S. at 402 (quoting from brief of U.S. Solicitor General).
8. See, e.g., *Wieter v. Settle*, 193 F. Supp. 318 (W.D. Mo. 1961).
9. See, e.g., Utah Code Ann. § 77-15-1 *et seq.* (2000).
10. Standards of competence have been one area of inquiry; the conceptualization of competence is another. Some researchers and scholars have provided reconceptualizations of competence to stand trial. Bruce J. Winick has persuasively argued that, in some circumstances, it might be in the best interests of the defendant to proceed with a trial, even if he or she is incompetent. See Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 *UCLA L. REV.* 921 (1985); and Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 *J. CRIM. L. & CRIMINOLOGY* 571 (1995). Winick postulated that this could take the form of a provisional trial in which the support of the defense attorney would serve to ensure protection of the defendant. This would allow the defendant to proceed with his or her case while maintaining decorum

OVERVIEW OF LEGAL PROCEDURES

The issue of competency may be raised at any point in the adjudication process.¹¹ If a court determines that a bona fide doubt exists as to a defendant's competency, it must consider this issue formally,¹² and usually after a forensic evaluation, which can take place in a jail, an outpatient facility, or in an institutional setting.

One legal issue that may concern evaluators of competency to stand trial is whether information obtained in a competency evaluation can be used against a defendant during the guilt phase of a trial or at sentencing. While some concerns have been raised about possible self-incrimination,¹³ all jurisdictions in the United States provide, either statutorily or through case law, that information obtained in a competency evaluation cannot be introduced on the issue of guilt unless the defendant places his or her mental state into evidence at either trial or sentencing hearings.¹⁴

Once a competency evaluation has been completed and the written report submitted,¹⁵ the court may schedule a hearing. If, however, both the defense and the prosecution accept the findings and recommendations in the report, a hearing does not have to take place. It is likely that in the majority of the states, a formal hearing is not held for most cases. If a hearing is held, the evaluators may be asked to testify, but most hearings are quite brief and usually only the written report of an evaluator is used. In fact, the majority of hearings last only a few minutes and are held simply to confirm the findings of evaluators.¹⁶ The ultimate decision about competency rests with the court, which is not bound by the evaluators' recommendations.¹⁷ In most cases, however, the court accepts the recommendations of the evaluators.¹⁸

At this point defendants found competent proceed with their

case. For defendants found incompetent, either their trials are postponed until competency is regained or the charges are dismissed, usually without prejudice. The disposition of incompetent defendants is perhaps the most problematic area of the competency procedures. Until the case of *Jackson v. Indiana*,¹⁹ virtually all states allowed the automatic and indefinite commitment of incompetent defendants. In *Jackson*, the U.S. Supreme Court held that defendants committed solely on the basis of incompetency "cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future."²⁰ The Supreme Court did not specify how long a period of time would be reasonable nor did it indicate how progress toward the goal of regaining competency could be assessed.

The *Jackson* decision led to revisions in state statutes to provide for alternatives to commitment as well as limits on the length of commitment.²¹ The length of confinement varies from state to state, with some states having specific time limits (e.g., 18 months) while other states base length of treatment on a proportion of the length of sentence that would have been given had the defendant been convicted.

Once defendants are found incompetent, they may have only limited rights to refuse treatment.²² Medication is the most common form of treatment, although some jurisdictions have established treatment programs designed to increase understanding of the legal process,²³ or that confront problems that

Although the exact wording varies, all states use a variant of the *Dusky* standard to define competency.

in the courtroom and without violating the defendant's constitutional rights. As well, Richard J. Bonnie has provided a reformulation of competence to stand trial. Bonnie proposed a distinction between two types of competencies—competence to assist counsel and decisional competence. He argued that defendants found incompetent to assist counsel would be barred from proceeding until they were restored to competence. See Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539 (1993). Defendants found decisionally incompetent, on the other hand, may be able to proceed in certain cases where his or her lawyer is able to present a defense. Although these reformulations are consistent with psychological perspectives on competence, they have not yet been adopted by the courts. Until the courts have accepted these ideas they will not significantly impact psychological practice.

11. Stephen L. Golding & Ronald Roesch, *Competency for Adjudication: An International Analysis*, in LAW AND MENTAL HEALTH: INTERNATIONAL PERSPECTIVES 73 (David N. Weisstub ed., Vol. 4, 1988).
12. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966).
13. See, e.g., W. T. Pizzi, *Competency to Stand Trial in Federal Courts: Conceptual and Constitutional Problems*, 45 U. CHI. L. REV. 20 (1977).
14. *Estelle v. Smith*, 451 U.S. 454 (1981); GOLDING & ROESCH, *supra* note 11.
15. See, for a discussion of the content of these reports, Gary B. Melton, John Petrila, Norman G. Poythress & Christopher

Slobogin, *PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS* (1987); Russell C. Petrella & Norman G. Poythress, *The Quality of Forensic Evaluations: An Interdisciplinary Study*, 51 J. CONSULTING & CLINICAL PSYCH. 76 (1983); Jennifer L. Skeem, Stephen L. Golding, Nancy B. Cohn & Gerald Berge, *The Logic and Reliability of Evaluations of Competence to Stand Trial*, 22 LAW & HUMAN BEHAV. 519 (1998).

16. HENRY J. STEADMAN, *BEATING A RAP?: DEFENDANTS FOUND INCOMPETENT TO STAND TRIAL* (1979).
17. See, e.g., *State v. Heger*, 326 N.W.2d 855 (N.D. 1982).
18. Stephen D. Hart & Robert D. Hare, *Predicting Fitness for Trial: The Relative Power of Demographic, Criminal and Clinical Variables*, 5 FORENSIC REP. 53 (1992); Steadman, *supra* note 16.
19. 406 U.S. 715 (1972).
20. 406 U.S. at 738.
21. RONALD ROESCH & STEPHEN L. GOLDING, *COMPETENCY TO STAND TRIAL* (1980).
22. See generally, Bruce J. Winick, *Incompetency to Stand Trial: Developments in the Law*, in MENTALLY DISORDERED OFFENDERS: PERSPECTIVES FROM LAW AND SOCIAL SCIENCE 3 (John Monahan & Henry J. Steadman eds., 1983).
23. L. Pendleton, *Treatment of Persons Found Incompetent to Stand Trial*, 137 AM. J. PSYCH. 1098 (1980); Christopher D. Webster, F. A. S. Jenson, L. Stermac, K. Gardner & D. Slomen, *Psychoeducational Programmes for Forensic Psychiatric Patients*, 26 CANADIAN PSYCH. 50 (1985).

Jennifer Skeem and her colleagues demonstrated that examiner agreement on specific psycholegal deficits (as opposed to general competency) averaged only 25%

hinder a defendant's ability to participate in the defense.²⁴ Laws regarding competence vary from state to state, although most jurisdictions follow procedures similar to those described above.

RESEARCH FINDINGS

Though there has been some confusion over the definition of competency per se, there nevertheless appears to be generally good

agreement between evaluators about whether a defendant is competent or not. The few studies of reliability that have been completed report that pairs of evaluators agree in 80% or more of the cases.²⁵ When evaluators are highly trained and use semi-structured competence assessment instruments, even higher rates of agreement have been reported.²⁶

When base rates of findings of competency are considered, however, these high levels of agreement are less impressive and they do not suggest that evaluators are necessarily in agreement about the criteria for a determination of competency. A psychologist, without even directly assessing a group of defendants, could achieve high levels of agreement with an examining clinician, simply by calling all defendants competent (base-rate decision). Since in most jurisdictions, approximately 80% of all referred defendants are competent, the psychologist and the examiner would have modest agreement, even with making no decisions at all. Most disturbingly, Jennifer Skeem and her colleagues demonstrated that examiner agreement on specific psycholegal deficits (as opposed to overall competency) averaged only 25% across a series of competency domains.²⁷ It is the more difficult decisions, involving cases where competency is truly a serious question, that are of concern. How reliable are decisions about these cases? To date, no study has accumulated enough of these cases to answer this question.

High levels of reliability do not, of course, ensure that valid decisions are being made. Two evaluators could agree that the presence of psychosis automatically leads to a finding of incompetency. As long as the evaluators are in agreement about their

criteria for determining psychosis, the reliability of their final judgments about competency will be high. It is quite possible that the criteria used by too many evaluators inappropriately rely on traditional mental status issues without considering the functional aspects of a particular defendant's case.

As we have indicated, the courts usually accept mental health judgments about competency. Does this mean that the judgments are valid? Not necessarily, since courts often accept the evaluator's definition of competency and his or her conclusions without review, leading to very high levels of examiner-judge agreement.²⁸

We have argued that the only ultimate way of assessing the validity of decisions about incompetency is to allow defendants who are believed to be incompetent to proceed with a trial anyway.²⁹ This could be a provisional trial (on the Illinois model), in which assessment of a defendant's performance could continue. If a defendant was unable to participate, then the trial could be stopped. If a verdict had already been reached and the defendant was convicted, the verdict could be set aside.

We suspect that in a significant percentage of trials, alleged incompetent defendants would be able to participate. In addition to the obvious advantages to defendants, the use of a provisional trial could provide valuable information about what should be expected of a defendant in certain judicial proceedings (e.g., the ability to testify, identify witnesses, describe events, evaluate the testimony of other witnesses, etc.). Short of a provisional trial, it may be possible to address the validity issue by having independent experts evaluate the information provided by evaluators and other collateral information sources. In the next section, we will review various methods for assessing competency.

CURRENT STATE OF ASSESSMENT

A major change that has occurred within the past few decades has been the development of a number of instruments specifically designed for assessing competence. This work was pioneered by A. Louis McGarry and his colleagues.³⁰ Their work was the starting point for a more sophisticated and systematic approach to the assessment of competency. In 1986, Thomas Grisso coined the term "forensic assessment instrument" (FAI) to refer to instruments that provide frameworks for conducting forensic assessments.³¹

FAIs are typically semistructured elicitation procedures and

24. D. L. Davis, *Treatment Planning for the Patient Who Is Incompetent to Stand Trial*, 36 HOSPITAL & COMMUNITY PSYCH. 268 (1985); A. M. Siegel & A. Elwork, *Treating Incompetence to Stand Trial*, 14 LAW & HUM. BEHAV. 57 (1990).
25. Norman G. Poythress & H. V. Stock, *Competency to Stand Trial: A Historical Review and Some New Data*, 8 PSYCH. & LAW 131 (1980); Roesch & Golding, *supra* note 21; Skeem, et al., *supra* note 15.
26. Stephen L. Golding, Ronald Roesch & Jan Schreiber, *Assessment and Conceptualization of Competency to Stand Trial: Preliminary Data on the Interdisciplinary Fitness Interview*, 8 LAW & HUM. BEHAV. 321 (1984); Robert A. Nicholson, & Karen E. Kugler, *Competent and Incompetent Criminal Defendants: A Quantitative Review of Comparative Research*, 109 PSYCH. BULL. 355 (1991).
27. See Skeem, et al. *supra* note 15. Competency domains might include ability to understand the nature of the proceedings, a fac-

tual understanding of the proceedings, and rational understanding of the proceedings and are set out in each state's competency statutes.
28. Hart & Hare, *supra* note 18; Skeem, et al., *supra* note 15.
29. See ROESCH & GOLDING, *supra* note 21.
30. Paul D. Lipsitt, D. Lelos & A. Louis McGarry, *Competency for Trial: A Screening Instrument*, 128 AMER. J. PSYCH. 105 (1971); A. Louis McGarry, *Competency for Trial and Due Process via the State Hospital*, 122 AM. J. PSYCH. 623 (1965); A. LOUIS MCGARRY, & W. J. CURRAN, *COMPETENCY TO STAND TRIAL AND MENTAL ILLNESS* (1973).
31. THOMAS GRISSO, *EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS* (1986).

lack the characteristics of many traditional psychological tests. However, they serve to make forensic assessments more systematic. These instruments help evaluators to collect important and relevant information and to follow the decision-making process that is required under the law. Since the time that the term was coined, a number of assessment instruments have been developed that are designed to work in this way, and it appears that the use of FAIs has been slowly increasing.³² This trend is encouraging in that empirical data suggest that trained examiners using FAIs achieve the highest levels of inter-examiner and examiner-adjudication agreement.³³ Next, we will briefly describe a few of these recently developed instruments.

The MacArthur Competence Assessment Tool—Criminal Adjudication. This measure, known as the MacCAT-CA,³⁴ was developed as part of the MacArthur Network on Mental Health and the Law. It was developed from a number of research instruments³⁵ and assesses three main abilities: understanding, reasoning, and appreciation.

The MacCAT-CA consists of 22 items and takes approximately 30 minutes to administer. The basis of the items is a short story about two men who get into a fight and one is subsequently charged with a criminal offense. The first eight items assess the individual's understanding of the legal system. Most of these items consist of two parts. The defendant's ability to understand is first assessed and, if it is unsatisfactory or appears to be questionable, the information is then disclosed to the defendant and his or her understanding is again assessed. This allows the evaluator to determine whether or not the individual is able to learn disclosed information. The next eight items assess the individual's reasoning skills by asking which of two disclosed facts would be most relevant to the case. Finally, the last six items assess the individual's appreciation of his or her own circumstances. National norms for the MacCAT-CA have been developed and published.³⁶

Other Specialized Assessment Instruments. In recent years, there has been a move toward the development of competence

assessment instruments for specialized populations of defendants. We will not go into detail about these specialized instruments here but the reader should be aware that they exist. Carol Everington has developed an instrument designed to assess competence with mentally retarded defendants called the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR).³⁷ Recent research on the CAST-MR has indicated that this instrument shows good reliability and validity.³⁸ Other researchers have focused their efforts on another special population—juvenile defendants,³⁹ finding that younger defendants are more likely to be found incompetent.

While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency.

THE FUNCTIONAL EVALUATION APPROACH

Although there are numerous ways in which to conduct competency evaluations, we believe that the most reasonable approach to the assessment of competency is based on a functional evaluation of a defendant's ability matched to the contextualized demands of the case.⁴⁰ While an assessment of the mental status of a defendant is important, it is not sufficient as a method of evaluating competency. Rather, the mental status information must be related to the specific demands of the legal case, as has been suggested by legal decisions such as the ones involving amnesia. As in the case of psychosis, a defendant with amnesia is not per se incompetent to stand trial, as has been held in a number of cases.⁴¹ In *State v. Davis*,⁴² the defendant had memory problems due to brain damage. Nevertheless, the Missouri Supreme Court held that amnesia by itself was not a sufficient reason to bar the trial of an otherwise competent defen-

32. Randy Borum & Thomas Grisso, *Psychological Test Use in Criminal Forensic Evaluations*, 26 PROF. PSYCH.: RES. & PRAC. 465 (1995).

33. Golding, Roesch & Schreiber, *supra* note 26; Nicholson & Kugler, *supra* note 26; Skeem, et al., *supra* note 15.

34. STEVEN K. HOGE, RICHARD J. BONNIE, NORMAN G. POYTHRESS & JOHN MONAHAN, *THE MACARTHUR COMPETENCE ASSESSMENT TOOL - CRIMINAL ADJUDICATION (MACCAT-CA)* (1999).

35. For a complete discussion of its development, see Hoge, et al., *supra* note 1.

36. See HOGE, ET AL., *supra* note 34.

37. Carol T. Everington, *The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study*, 17 CRIM. J. & BEHAV. 147 (1990).

38. Carol Everington & C. Dunn, *A Second Validation Study of the Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR)*, 22 CRIM. J. & BEHAV. 44 (1995).

39. Deborah K. Cooper, *Juvenile Competency to Stand Trial: The Effects of Age and Presentation of Factual Information in the Attainment of Competency in Juveniles*, 56 (10-B) DISSERTATION ABSTRACTS INTERNATIONAL 5761 (1995); V. L. Cowden & G. R. McKee,

Competency to Stand Trial in Juvenile Delinquency Proceedings—Cognitive Maturity and the Attorney-Client Relationship, 33 U. LOUISVILLE J. FAM. L. 629 (1995).

40. A recent Supreme Court decision (*Godinez v. Moran*, 509 U.S. 389 (1993), discussed later) has been interpreted by some as being in opposition to a functional evaluation approach and, therefore, indicative of tension between the application of good social science principles and the views of the U.S. Supreme Court. The ruling in *Godinez* indicated that the *standard* for all types of competence was to be the same (i.e., that set out in *Dusky*) to meet the constitutional minimum. In *Godinez*, the Court noted that “while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements.” *Id.* at 402. Therefore, it appears that the functional evaluation approach may still be used in those states that have adopted more elaborate standards of competence while still satisfying the minimum *Dusky* standard.

41. See, e.g., *Wilson v. United States*, 391 F.2d. 460 (D.C. Cir. 1968); *Ritchie v. Indiana*, 468 N. E. 2d. 1369 (Ind. 1984).

42. 653 S. W. 2d. 167 (Mo. 1983).

[C]ompetence should be considered within the context in which it is to be used: the abilities required by the defendant in his or her specific case should be taken into account

dant. In *State v. Austed*,⁴³ the Montana Supreme Court held that the bulk of the evidence against the defendant was physical and not affected by amnesia. Finally, in a Maryland decision,⁴⁴ the court held that, because of the potential for fraud, amnesia does not justify a finding of incompetence. The court also stated that everyone has amnesia to some degree since the passage of time erodes memory. These decisions are of interest because they support the view that evaluators cannot reach a finding of incompeten-

cy independent of the facts of the legal case—an issue we will return to later. Similarly, a defendant may be psychotic and still be found competent to stand trial if the symptoms do not impair the defendant's functional ability to consult with his or her attorney and otherwise rationally participate in the legal process.

Some cases are more complex than others and may, as a result, require different types of psycholegal abilities. Thus, it may be that the same defendant is competent for one type of legal proceeding but not for others. In certain cases, a defendant may be required to testify. In this instance, a defendant who is likely to withdraw in a catatonic-like state may be incompetent. But the same defendant may be able to proceed if the attorney intends to plea bargain (the way in which the vast majority of all criminal cases are handled).

The functional approach is illustrated in the famous amnesia case of *Wilson v. United States*.⁴⁵ In that decision, the U.S. Court of Appeals for the District of Columbia held that six factors should be considered in determining whether a defendant's amnesia impaired the ability to stand trial:

- The extent to which the amnesia affected the defendant's ability to consult with and assist his lawyer.
- The extent to which the amnesia affected the defendant's ability to testify in his own behalf.
- The extent to which the evidence in suit could be extrinsically reconstructed in view of the defendant's amnesia. Such evidence would include evidence relating to the crime itself as well as any reasonable possible alibi.
- The extent to which the government assisted the defendant and his counsel in that reconstruction.
- The strength of the prosecution's case. Most important

here will be whether the government's case is such as to negate all reasonable hypotheses of innocence. If there is any substantial possibility that the accused could, but for his amnesia, establish an alibi or other defense, it should be presumed that he would have been able to do so.

- Any other facts and circumstances that would indicate whether or not the defendant had a fair trial.⁴⁶

One could substitute any symptom for amnesia in the above quote. If this were done, the evaluation of competency would certainly be one based on a determination of the manner in which a defendant's incapacity may have an effect on the legal proceedings. In fact, some states, such as Florida⁴⁷ and Utah,⁴⁸ already specify that the evaluators must relate a defendant's mental condition to clearly defined legal factors, such as the defendant's appreciation of the charges, the range and nature of possible penalties, and capacity to disclose to the defense attorney pertinent facts surrounding the alleged offense.⁴⁹ Utah's statute goes the furthest in this direction, specifying the most comprehensive range of psycholegal abilities to be addressed by evaluators (including the negative effects of medication as well as decisional competencies) and also requiring judges to identify specifically which psycholegal abilities are impaired when a defendant is found incompetent.

The most important aspect of assessing competence, therefore, is an assessment of the specific psycholegal abilities required of a particular defendant. That is, competence should be considered within the context in which it is to be used: the abilities required by the defendant in his or her specific case should be taken into account when assessing competence. This contextual perspective was summarized by Stephen Golding and Ronald Roesch⁵⁰ as follows:

Mere presence of severe disturbance (a psychopathological criterion) is only a threshold issue—it must be further demonstrated that such severe disturbance in *this* defendant, facing *these* charges, *in light of existing* evidence, anticipating the substantial effort of a *particular* attorney with a *relationship of known characteristics*, results in the defendant being unable to rationally assist the attorney or to comprehend the nature of the proceedings and their likely outcome.⁵¹

The importance of a contextual determination of specific psycholegal abilities has been repeatedly demonstrated by empirical findings that competency assessments in one area of functioning are rarely homogeneous with assessments in other areas of functioning.⁵² For example, assessments of compe-

43. 641 P. 2d. 1373 (Mont. 1982).

44. *Morrow v. Maryland*, 443 A. 2d. 108 (Md. 1982).

45. 391 F. 2d. 460.

46. *Id.* at 463-64.

47. Fl. R. Crim. Pro. § 3.21 (a)(1); see Bruce Winick, *supra* note 22, at 38.

48. Utah Code Ann. § 77-15-1 *et seq.* (2000).

49. Winick, *supra* note 22, at 38.

50. Golding & Roesch, *supra* note 11.

51. *Id.* at 79 (emphasis in original).

52. Bonnie, *supra* note 2; Bonnie, *supra* note 10; Thomas Grisso, Paul Appelbaum, Edward Mulvey & K. Fletcher, *The MacArthur Treatment Competence Study II: Measures of Abilities Related to Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 127 (1995); Skeem, et al., *supra* note 15; Karen E. Whittemore, James R. P. Ogloff & Ronald Roesch, *An Investigation of Competency to Participate in Legal Proceedings in Canada*, 42 CANADIAN J. PSYCH. 1 (1997); Patricia A. Zapf, *An Investigation of the Construct of Competence in a Criminal and Civil Context: A Comparison of the FIT, the MacCAT-CA, and the MacCAT*, DISSERTATION ABSTRACTS INTERNATIONAL (1998).

tency to stand trial may not necessarily correspond with assessments of competency to plead guilty. Likewise, assessments of competency to waive *Miranda* may not correspond with assessments of competency to stand trial or competency to plead guilty.

A more recent Supreme Court decision, however, has confused this issue by finding that the standard by which competency to be judged is not context-specific. In *Godinez v. Moran*,⁵³ the United States Supreme Court held that the *standard* for the various types of competency (*i.e.*, competency to plead guilty, to waive counsel, to stand trial) should be considered the same. Justice Thomas wrote for the majority:

The standard adopted by the Ninth Circuit is whether a defendant who seeks to plead guilty or waive counsel has the capacity for “reasoned choice” among the alternatives available to him. How this standard is different from (much less higher than) the *Dusky* standard—whether the defendant has a “rational understanding” of the proceedings—is not readily apparent to us. . . . While the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial. . . . Nor do we think that a defendant who waives his right to the assistance of counsel must be more competent than the defendant who does not, since there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights.⁵⁴

In his dissent, Justice Blackmun argued that the “majority’s analysis [was] contrary to both common sense and long-standing case law.”⁵⁵ He reasoned that competency could be considered in a vacuum, separate from its specific legal context. Justice Blackmun argued that “[c]ompetency for one purpose does not necessarily translate to competency for another purpose”⁵⁶ and noted that prior Supreme Court cases had “required competency evaluations to be specifically tailored to the context and purpose of a proceeding.”⁵⁷ What was egregiously missing from the majority’s opinion in *Godinez*, however, was the fact that Moran’s competency to waive counsel or plead guilty to death penalty murder charges was never assessed by the forensic examiners, regardless of which standard (rational choice or rational understanding) was employed.

The *Godinez* holding has been subsequently criticized by legal scholars⁵⁸ and courts alike. In a concurring opinion, one federal appellate judge wrote that the case under review “presents us with a window through which to view the real-world effects of the Supreme Court’s decision in *Godinez v. Moran*,

and it is not a pretty sight.”⁵⁹ The problem is not whether or not the *standards* for various psycholegal competencies are higher, different, or the same, but rather, more fundamentally, whether or not the defendant has been examined with respect to these issues in the first place.

The *Godinez* holding has been subsequently criticized by legal scholars and courts alike.

REPORTS

In this final section, we will outline the information that should be contained in reports that are submitted to the court with respect to the issue of competence. One of the first pieces of information that should be contained in the report is the defendant’s identifying information. This usually includes the defendant’s demographics, the circumstances of the referral, the defendant’s criminal charges, and some statement about the current stage of proceedings. Another piece of information that should be included relatively early in the report is some statement about the procedures that were used for the competency evaluation. This should include the dates and places that the defendant was interviewed, any psychological tests or forensic assessment instruments that were administered to the defendant, other data gathered, collateral information or interviews used, documents reviewed, and the techniques used during the evaluation. A section on the defendant’s relevant history, usually including psychiatric/medical history, education, employment, and social history, is necessary to give the defendant’s background and to note any important aspects of the defendant’s background that may impact upon his or her case in some way.

There are two areas that *must* be addressed in a competency report: the defendant’s current clinical presentation (including the defendant’s presentation and possibly his or her motivation, test results, reports of others, and diagnosis) and some statement about the defendant’s ability to proceed to trial (or the next stage in the proceedings). These two areas are the focal point of the evaluation.

Since we advocate for a functional assessment of a defendant’s competencies, we believe that it is necessary that the evaluator ask questions that are pertinent to the individual defendant’s case. A good competency report will set out each of the specific criteria that are required within the jurisdiction and will offer an opinion as to whether the defendant meets each of the specific criteria. These statements should be supported with the evaluator’s behavioral observations of the defendant or through illustrative dialogue between the defendant and the evaluator. In addition to these two areas that must be addressed, a useful report will also contain a section

53. 509 U.S. 389 (1993).

54. *Id.* at 397-99.

55. *Id.* at 409.

56. *Id.* at 413.

57. *Id.* at 2694.

58. Michael L. Perlin, “Dignity Was the First to Leave”: *Godinez v. Moran*, Colin Ferguson, and the Trial of Mentally Disabled Criminal Defendants, 14 BEHAV. SCI. & L. 61, 81 (1996).

59. Government of the Virgin Islands v. Charles, 72 F3d 401, 411 (3rd Cir. 1995) (Lewis, J., concurring).

[A] functional evaluation of competence is consistent with psychological theory and research. Competence is not a global construct, but rather is context-specific.

where the evaluator will present his or her opinion regarding the defendant's competency to proceed. Although evaluators are prohibited from speaking to the ultimate legal issue of competency, they are expected to arrive at some conclusion about a defendant's competency. A good report should include the evaluator's final opinion as to whether or not a defendant meets the required criteria to proceed. As we indicated earlier, in the majority of cases, the court

accepts the recommendation of the evaluator.⁶⁰

A poorly prepared report is one that does not include the basic information described above. Those components of a report that are considered to be essential include names, relevant dates, charges, data sources, notification to defendant of the purpose of the evaluation, limits on confidentiality, psychiatric history, current mental status, current use of psychotropic medication, and information specific to each forensic question being assessed.⁶¹ With respect to the use of forensic assessment instruments or formal psychological testing, Randy Borum and Thomas Grisso found, in a survey of assessment practices, that one-third of respondents reported using forensic assessment instruments regularly, whereas most respondents reported using general psychological instruments (such as the Wechsler Adult Intelligence Scale) in forensic assessments.⁶² In light of the advances in the area of forensic assessment and the development of specialized forensic assessment instruments, the practice of routinely using only general psychological instruments, in lieu of forensic assessment instruments, appears to be inadequate.

A poorly prepared report will include opinions that have no basis. If the author of a report states opinions without also including the bases for the opinion, one should be skeptical. It is good psychological practice to back up any stated opinion with observations, descriptions, and justifications for why that opinion was reached. It is also good practice to detail behavioral observations and descriptions that lend support for an opinion as well as any other observations that may be in opposition to the opinion reached. That is, any inconsistencies that were noted throughout the evaluation as well as any alternative hypotheses that may be reached will also be documented in a good report.

The Florida Rules of Criminal Procedure⁶³ provide a useful report checklist by requiring that each of the following elements must be contained in a written report submitted by an expert:

- the specific matters referred for evaluation,

- the evaluative procedures, techniques and tests used in the examination and the purpose or purposes for each,
- the expert's clinical observations, findings and opinions on each issue referred for evaluation by the court, indicating specifically those issues, if any, on which the expert could not give an opinion, and
- the sources of information used by the expert and the factual basis for the expert's clinical findings and opinions.

In some jurisdictions, if the evaluator concludes that the defendant could be considered incompetent to proceed, some statement about the restorability of the defendant is required to be included in the report. In addition, some jurisdictions require evaluators to include an opinion regarding whether the defendant would meet criteria for commitment. Finally, some jurisdictions require the evaluator to include other recommendations, such as the possibility of counseling for the defendant, treatment for the defendant while incarcerated, or other special observation precautions.

SUMMARY AND CONCLUSIONS

To conclude, we leave the reader with a summary of the five main points discussed in this article. First, the *Dusky* standard sets the foundation for every state's competency-to-stand-trial standard. In addition, as per the decision in *Godinez*, the *Dusky* standard also sets the foundation for every state's standards for other types of criminal competencies (e.g., competency to waive Miranda rights, competency to plead guilty, competency to confess). Each state is free to elaborate standards for different types of competencies; however, the *Dusky* standard is the minimum constitutional requirement.

Second, there is no true way to assess the validity of competency determinations short of a provisional trial. The only way to truly determine that an individual is not able to participate in his or her own defense is to allow that individual to proceed. As we have described, some states have these provisions but they are not utilized.

Third, a functional evaluation of competence is consistent with psychological theory and research. Competence is not a global construct, but rather is context-specific. It is possible for an individual to be competent with respect to one area of functioning but incompetent with respect to another. A good forensic evaluation will assess a specific individual's competence with respect to a particular set of abilities, in light of the specific characteristics of the individual and the circumstances of the individual's case.

Fourth, there have been a number of forensic assessment instruments developed to assist evaluators in the assessment of competency. In general, reliability increases with the use of these instruments.

Fifth, a good forensic report must include information about the defendant's current clinical presentation as well as information about the specific forensic question being assessed

60. Hart & Hare, *supra* note 18.

61. Randy Borum & Thomas Grisso, *Establishing Standards for Criminal Forensic Reports: An Empirical Analysis*, 24 BULL. AMER.

ACAD. PSYCH. & L. 297 (1996).

62. Borum & Grisso, *supra* note 32.

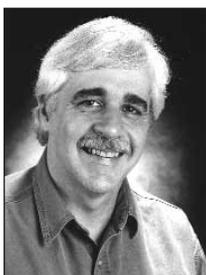
63. Fl. R. Crim. Pro. § 3.211 (a).

(i.e., competency to proceed). In addition, a good forensic report should include descriptions and observations that serve as the basis for the opinions or conclusions stated in the report.

The purpose of this article was to present an overview of competency laws, research, methods of assessment, and the content of competency reports submitted to the courts by expert evaluators. We believe that by informing legal professionals of the current state of the discipline with respect to competency evaluations we will begin to bridge the gap that often exists between psychology and the legal profession. There exists a body of research and literature that examines issues that are at the heart of both psychology and the law; however, often this literature is only accessed by one set of professionals or another. We hope that publishing articles such as this, in sources that are easily accessed by legal professionals, and in a format familiar to legal professionals, will facilitate a better understanding of psychology as it pertains to the legal system.



Patricia A. Zapf is an assistant professor of psychology at the University of Alabama. She received her Ph.D. in psychology in 1999 from Simon Fraser University in Canada. Her prior publications in the field of psychology have included ones concerning the assessment of competency to stand trial and the usefulness of various methods of competency assessment.



Ronald Roesch is a professor of psychology at Simon Fraser University in Burnaby, British Columbia, Canada. From 1988 to 1996, he was the editor of Law and Human Behavior, one of the leading journals in law and psychology; he presently edits a series of books sponsored by the American Psychology-Law Society (APLS), a division of the American Psychological Association. Roesch was president of the APLS in 1993-94. He has studied and written about issues involving the assessment of competency to stand trial for more than two decades.

AMERICAN JUDGES ASSOCIATION Future Conferences

2001 Midyear Meeting

March 29-31, 2001
Hot Springs, Arkansas
Austin Hot Springs Convention Center
(\$90 single or double)

2001 Annual Conference

September 30-October 5, 2001
Reno, Nevada
Silver Legacy Resort
(\$89 single or double)

2002 Midyear Meeting

Biloxi, Mississippi
(Dates and hotel to be determined)

2002 Annual Conference

September 8-13, 2002
Maui, Hawaii
The Westin Maui
(\$155 single or double, golf/mountain view;
\$169 single or double, ocean view)

2003 Midyear Meeting

Billings, Montana
(Dates and hotel to be determined)

2003 Annual Conference

Montreal, Quebec
(Dates and hotel to be determined)